United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-2381

1-24

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

MICHAEL HOLODNAK,

Plaintiff-Appellee,

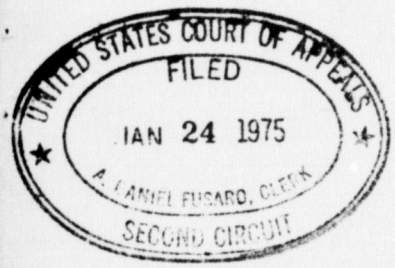
vs.

AVCO CORPORATION, AVCO-LYCOMING DIVISION, STATFORD, CONNECTICUT,

Defendant-Appellant.

On Appeal from the United States District Court For the District of Connecticut

REPLY BRIEF OF DEFENDANT-APPELLANT



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REPLY BRIEF OF DEFENDANT-APPELLANT

Introduction

In this reply we will treat of the subject matters of the answering brief of the Plaintiff-Appellee in the same order as was used by him.

Plaintiff has made it very clear in his answering brief that, at the time of his discharge, he was engaged in an undertaking designed to bring about a return to militancy, if you will, and to reform the union movement in general

and the UAW and its Local 1010 in particular.[1] We have no quarrel with his quarrel with unions or with UAW Local 1010. We only objected when the collectively bargained processes were impugned, wildcat strikes were advocated and when Avco was accused of having bribed union officials and the Permanent Arbitrator, plus various unknown and as yet unidentified judges—all at a time when restoration of "confidence in the integrity of the [arbitration] process" was critical (to put it in the terms used by the Supreme Court in *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960)).

Plaintiff's answering brief also gives us a new perspective on the objectives of Plaintiff's counsel. We made a mistake in our main brief in suggesting that Avco was being "'constitutionalized' into a governmental presence" (Avco's main brief, page 29). Plaintiff's counsel would go further: he wants all large defense contractors "'nationalized' thereby converting them 'from *de facto* to *de jure* public enterprises'" (Plaintiff's brief page 26). He

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[1] See Pages 8 and 9 of the Answering Brief where Plaintiff specifically says:

> "The Article states important truths about the local union at Avco and the American labor movement in general. Rank and file members tend to be aggressive in their demands. Union leaders for several reasons are unable to respond. They counsel 'moderation' so that the company will not move away or Congress enact repressive laws. Through day-to-day dealings with company representatives, union leaders tend to be won over to a company perspective on issues. The differences in outlook breed resentment and alienation. Union officials grow cynical and regard the rank and file as 'selfish and fickle'. The rank and file consider themselves 'betrayed'. In Holodnak's view, the officials fail to channel rank and file militancy effectively."

would use this case as a vehicle for reaching the remarkable result that participation in the labor arbitration process alone is sufficient governmental action to destroy the heretofore sacrosanct distinction between private and government conduct and make the First Amendment applicable (Plaintiff's brief 32-36).

At the risk of being accused of lack of legal initiative or imagination, we would just as soon have this case treated for what it is—an attempt by an employer to uphold the integrity of its collective bargaining process and to maintain labor peace on its premises.

Plaintiff's Statement of Facts

We disagree with much of Plaintiff's rendering of the facts in the opening portion of his Brief. We have indicated some of the things we find to be wrong with it in a Table we are appending to this reply entitled "Inaccurate Or Incomplete Statements in Plaintiff's Brief." We note only in passing that Plaintiff has departed from observance of the usual requirement that a Statement of Facts contain an objective presentation and avoid argument.[2]

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[2] Plaintiff's Statement of Facts is replete with argumentative analyses. The references to Rule 19 on Page 15 of his brief are as good an example as any:

> "Rule 19, on which Holodnak's dismissal was based, is best described as an employee gag rule. As with most such rules, it is a masterpiece of obscurity and ambiguity. To say that it is characterized by 'overbreadth' is an understatement."

PLAINTIFF'S ARGUMENT, POINT I

Plaintiff contends that "evident partiality" on the part of the Permanent Arbitrator is clear from a review of the arbitration record. He fails to answer our Main Brief position, however, that the entry of the order by Judge Zampano on recommendation of Magistrate Latimer after reviewing the parties' Cross Motions for Summary Judgment establishes, *ipso facto,* partiality is *not* clearly evident.

Judge Zampano's order expressly concludes that the allegation that bias is "evident on the face of the arbitration hearing transcript" is not sustainable and he determined that "* * * [T]he Arbitrator [did not display] any hostility to plaintiff or predisposition to favor the company's stance . . ." (Ap. 65a). All Plaintiff had to say on this most telling point was that the record on Summary Judgment is incomplete (page 23 of Plaintiff's Brief). Normally that would be true. But not this time. Magistrate Latimer and Judge Zampano had before them the exact same transcript of record which was scanned by Judge Lumbard and which was the basis for his conclusion of "evident partiality."

The fact that rational judicial minds would reach diametrically opposed results on the same record is the best evidence there is that there was no demonstration of "evident partiality".

We agree with Plaintiff that it is incumbent upon arbitrators "to engender confidence in the integrity of the process". *United Steelworkers* v. *Enterprise Wheel & Car Corp., supra,* (Plaintiff's Brief p. 22). We disagree with Plaintiff's contention that the rest of the *Steelworker Trilogy* and *Gateway Coal Co.* v. *United Mine Workers,* 414 U.S. 368 (1974) are irrelevant. We contend instead that *Gateway* tells us the Supreme Court mandate (con-

tained in the *Trilogy*) to the members of the Federal Court system to support the national policy favoring labor arbitration has been reinforced.

Gateway was a difficult case, because in deciding that an injunction against a strike pending arbitration of a dispute concerning a safety issue was appropriate, the Court had to encounter the unsafe conditions exception to the contractual no-strike obligation provided in Section 502 of the LMRA.[3] The Court concluded Section 502 had to be limited, stating at 414 U.S. 386:

> "Absent the most explicit statutory command we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment [of the existence of abnormal dangerous conditions]".

Presumably the Court felt constrained to speak out in the foregoing fashion not only to clarify its belief in arbitration as a substitute for industrial strife and to express the concomitant limitation on Section 502, but also to alert the Courts to the fact that its recent refusal to defer to arbitration in civil rights matters (*Alexander* v. *Gardner-Denver*, 415 U.S. 36 (1974)) was the result of a clear signal by Congress and not because of any lessening of its conviction. It seems to us that the *Gateway* decision is just as clear a signal to the Federal Courts that vacation of a labor arbitration award should not be predicated on so conjectural a ground as occurred here.

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[3] 29 U.S.C. §143.

PLAINTIFF'S ARGUMENT, POINT IIA

In reviewing Plaintiff's contention that we were acting as an arm of the government in discharging Holodnak, we commend to this Court the recent decision of the United States Supreme Court in *Jackson* v. *Metropolitan Edison Company,* —— U.S., ——, 43 LW 4110 (December 23, 1974). The Court there found no "state action" in the termination of a consumer's electric service without a hearing and it accordingly rejected the consumer's claim that she had been deprived of her property without due process of law in violation of her Constitutional guarantees.

The Supreme Court analyzed the state or government action concept at length and decided that a key question to be answered is "whether there is a substantially close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." (43 LW at 4112).

There is no evidence in this case of any federal government participation or involvement in either the discharge of Holodnak or the subsequent grievance and arbitration proceedings. There is no evidence that Congress or any agency of the federal government either approved or disapproved of Holodnak's discharge or participated in any way at any time in regard either to Holodnak's discharge or the subsequent proceedings related thereto. So there is no "nexus" here between the challenged action and government.

The *Jackson* Court notes that it has found "state action" present in the exercise by a private entity of powers traditionally exclusively reserved to the State. (43 LW at 4112). But that's not our case either.

Plaintiff's brief (and the lower court agrees) proposes that ownership of the Stratford plant by the Department of Defense, plus Avco's status as a "major defense contractor" (15% of our total sales is not really major in our opinion), plus on-site quality control activities with respect to the products made at the Stratford plant for the Defense Department are sufficient to conclude all of Avco's activities were inbued with a governmental character and Avco's action in discharging Holodnak was "state action". The *Jackson* Court would conclude differently. The high degree of governmental regulation of private utilities which may even result frequently in the requirement that business practices be approved "does not transmute a practice initiated by the utility [though] approved by the Commission into 'state action' . . . All of the petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated private utility, enjoying at least a partial monopoly in providing all electrical service within its territory, and that it elected to terminate service to petitioner . . . Under our decision this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State . . ." 43 LW at 4113, 4114.

We can't avoid noting, possibly because we take so much satisfaction from it, that the Supreme Court described the ultimate result of plaintiff's theory on expansion of the doctrine of state action in much the same terms as proposed by us in our Main Brief (page 37) as follows:

> "Doctors, optometrists, lawyers, Metropolitan and *Nebbia's* upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State." 43 LW at 4113.

PLAINTIFF'S ARGUMENT, POINT IIB

Plaintiff's suggestion that the very fact of arbitral review constitutes sufficient governmental action to make the First Amendment applicable would destroy the dichotomy between protection against state deprivation of rights and private conduct so long deemed essential. The U. S. Supreme Court recently reiterated its commitment to retention of the distinction in *Jackson* v. *Metropolitan Edison Company,* —— U.S. ——, 43 LW 4110 (12-23-74) saying at 43 LW 4112:

> ". . . [P]etitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all businesses 'affected with the public interest' are state actors in all their actions.
>
> We decline the invitation for reasons stated long ago in *Nebbia* v. *New York,* 291 U.S. 502 (1934), in the course of rejecting a substantive due process attack on state legislation."

Further answer is to be found in the Supreme Court and Courts of Appeals' decisions cited on Pages 28 to 42 of our Main Brief and again above in this Reply Brief which stand for the proposition that even extensive and detailed governmental regulation and cognizance under express statutory provisions are of themselves insufficient governmental involvement to imbue the actions of a private employer with governmental character.[4] There must be the "symbiotic relationship presented in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961),"[5] which we do not have in this case.

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[4] See especially in this connection, *Moose Lodge No. 197* v. *Irvis, supra,* at 407 U.S. 176-177; and *Wahba* v. *New York University, et al, supra,* 492 F2d. at 102.

[5] *Jackson* v. *Metropolitan Edison Company, supra,* 43 LW at 4114.

The citations in this section of Plaintiff's brief do not support the reading of the Bill of Rights which Plaintiff proposes. If anything, they underscore our insistence on the importance of arbitration as an instrument of Federal policy for resolving disputes between labor and management and our suggestion that Title VII litigation is inapposite, involving as it does policy objectives and constitutional currents of a character entirely dissimliar to that presented here.

PLAINTIFF'S ARGUMENT, POINT IIC

Plaintiff says, in effect, that in any event the discharge was not for just cause and that the case of *Arnett* v. *Kennedy,* U.S. 40 L Ed 2d 15 (1974) is not in point.

But let's look at *Arnett* and let its facts speak for themselves. In that case the plaintiff, a Civil Service employee of the Federal government as a Field Representative in the Office of Economic Opportunity (OEO), was discharged because he had stated publicly that the Regional Director of the OEO and his Administrative Assistant had attempted to bribe a representative of a community action organization with whom the OEO had dealings. The discharged employee instituted action in the United States District Court claiming, *inter alia,* that his discharge violated his First Amendment rights.

5 U.S.C. §7501 provided that an individual in the competitive Civil Service may be removed ". . . for such cause as will promote the efficiency of the Service." At the time in question, the OEO and the Civil Service Commission had issued regulations in nearly identical language requiring that employees: "'avoid any action . . . which might result in, or create the appearance of . . . [a]ffecting adversely the confidence of the public in the integrity of (OEO and) the government' and that employees not

'engage in criminal, infamous, dishonest, immoral or notoriously disgraceful or other conduct prejudicial to the government.'" (40 L Ed 2d at 26).

The Supreme Court, in reversing the District Court's entry of summary judgment on behalf of the plaintiff, held that the provisions of 5 U.S.C. §7501 were constitutionally sufficient against the charges of the plaintiff which, interestingly, were that the regulation was "vague and overbroad." The Court held that this patently parallel regulation to the one in the Avco rules authorized dismissal of an employee for speech, as well as other conduct, *without* offending the guarantees of the First Amendment.

In *Arnett,* the employee accused the Regional Director of the OEO and the Administrative Assistant of attempting to bribe a representative of a community action organization. Here, Holodnak wrote that *Avco* sabotaged the grievance procedures, bought off any effective opposition with a foremanship, and that the biased judges and arbitrators for all practical purposes belonged to Avco. In addition, he condoned the use of wildcat strikes. Holodnak admittedly had no proof of these claims.

If an employee of the Federal government can be discharged for making false statements concerning a fellow employee in violation of the conduct rules of a governmental agency without violating his First Amendment rights, then certainly Holodnak, an employee of an admittedly private corporation, can be discharged (and have it called just cause) for writing an article, admittedly false, concerning Avco in violation of the provisions of Plant Conduct Rule 19, without violating Holodnak's First Amendment rights.

Plaintiff and the trial court say *Arnett* should be ignored because in *Arnett* the discharged employee identi-

fied the individual he was falsely accusing while Holodnak named no names. This is a distinction without a difference as to the arbitrator—who could have been no one but Turkus. And, of course, Holodnak *did* name Avco and, no matter how many times plaintiff says differently in his briefs—that is a fact.

Plaintiff says (page 37 of his brief) that his article was "not potentially disruptive of production." However, the lengthy and dismal history of illegal strikes at Avco, set forth in Exhibit B, demonstrates that disruptions in production do indeed occur during wildcat strikes. Holodnak concurs. See Ap. 209a.

NLRB v. *Magnavox* [415 U.S. 322 (1974)] and *Cole* v. *Hall* [462 F2d 277 (2d Cir. 1972), Aff'd 412 U.S. 1 (1973)] cited by plaintiff (pages 37 and 38 of his brief) are not relevant here. They relate to exercise of membership rights and opportunities for commentary by union members about unions. What Holodnak had to say about his union is no concern of ours. We objected when he attacked Avco and our grievance and arbitration process.

PLAINTIFF'S ARGUMENT, POINT III

Plaintiff asserts that the judgment against Defendant Union is final and conclusive and cannot be reopened on this Appeal. However, since Avco has done everything required of it to preserve for consideration by this Court the question of the propriety of the judgments entered against it, it seems to us that the findings in this respect, though conclusive as to the defendant union, should not be so construed as to Avco.

Judge Lumbard in his preface to his decision on the second cause of action stated:

> "Ordinarily an employee may not challenge in the courts the decision of an arbitrator where based on the interpretation of the collective bargaining agreement following a fair hearing of his grievance. . . . However, where the union has failed to provide him with fair representation in the course of the grievance or arbitration process, the arbitrator's award is not binding on the employee and he may maintain an action under § 301 of the LMRA against the employer and the union. . . . The reason is that the employee's grievance can hardly have been given due consideration by the arbitrator when it was not fairly presented by his representative union . . . Here there can be little question that Holodnak was not fairly represented in the arbitration by the union's attorney, Edward Burstein". (Ap. 87a, 88a)

Unless we are in the position of being able to call this court's attention to the error committed below in this regard, the sins of the lawyer are not only visited on his client, but on everyone else associated in a law suit with his client as well.

We remind the Court that it was not Defendant union as an entity which was found to have represented the Plaintiff perfunctorily. Indeed, Plaintiff frequently reiterated that the handling of his grievance and its prosecution through the process into arbitration was reasonably and properly undertaken by the union (Ap. 246a). The crux of the lack of the fair representation finding was the manner in which retained counsel comported himself.

Two bases underlie the Court's conclusion that Burstein did not do what he should have done. The Court said: "Although he recognized that important free speech rights

were involved, he conceded, probably because of inadequate preparation, that Rule 19, which is certainly vague and easily susceptible to an overbroad interpretation, was reasonable. . . . Burstein should have argued that the parties to the agreement did not intend to allow dismissal for conduct such as Holodnak's". (Ap. 89a, 90a). The Court went on to state the second of his two grounds: "Finally, Burstein made no effort to distinguish what might be considered to be factual statements in Holodnak's article from statements of opinion and hyperbole (Ap. 90a).

As to the first of the two, we proposed in our Main Brief (p. 48) the alternate view that Burstein as well as the Permanent Arbitrator were fully aware that Rule 19 was reasonable, if for no other reason than by lapse of time, and not susceptible of contest. Plaintiff has obligingly supported us in that respect and acknowledged, albeit belatedly, that the Permanent Arbitrator even if asked would have had no right or authority to do anything about Rule 19 (Plaintiff's brief, p. 36).

That leaves us with a dispute on semantics as the only predicate for concluding lack of fair representation and for finding in turn that the Section 301 action against Avco was properly maintainable. We think the *Steelworkers' Trilogy* imposes a sterner test for sidestepping a labor arbitration.

PLAINTIFF'S ARGUMENT, POINT IV

The cases cited by Holodnak in his discussion of the availability of punitive damages under Section 301 of the Labor Management Relations Act can be broken down into three categories: (1) *Textile Workers Union* v. *Lincoln Mills,* 353 US 448 (1957), *Vaca* v. *Sipes,* 386 US

171 (1961), and *Richardson* v. *Communications Workers of America,* 486 F 2d 801 (8th Cir. 1973) are all very interesting and relevant but not on this point, since they do not deal with punitive damages in any respect. (2) *United Shoe Workers* v. *Brooks Mfg. Co.,* 298 F 2d 277 (3rd Cir.1962), *Williams* v. *Pacific Maritime Association,* 421 F 2d 1287 (9th Cir. 1970), and *Dill* v. *Greyhound Corp.,* 435 F 2d 231 (6th Cir. 1970) specifically hold that punitive damages are *unavailable* in a Section 301 action. (3) The district court decisions are all treated of and distinguished in our Main Brief at pages 44 and 45, except *Butler* v. *Yellow Freight System, Inc.,* 374 F. Supp. 747 (W.D.Mass. 1974) and *Central Appalachian Coal Co.* v. *UMW,* 376 F. Supp. 914 (S.D.W.Va. 1974). Without exception, each case states that punitive or exemplary damages are an extraordinary remedy and require "bad faith" or "misconduct" to be shown as a prerequisite to award. Judge Lumbard specifically found that "there is no evidence that punitive damages are necessary to deter future violations by Avco" (Ap. 104a), which is another way of saying there was no "bad faith" or "misconduct" on Avco's part.

Of all the cases cited by Plaintiff, only *Butler* actually awarded punitive damages, and then only after the jury

> "found the defendant's conduct to be of such an extreme, arbitrary, oppressive or intentional nature that this unique and extraordinary remedy was warranted in order to promote industrial peace and deter similar misconduct in the future." *Butler* v. *Yellow Freight Systems, Inc.,* 374 F. Supp. 747, 754 (W.D.Mass. 1974).

PLAINTIFFS ARGUMENT, POINT V

In response to Holodnak's claim that Avco's brief is ambiguous on the subject of the statute of limitations, let it be said that Avco's position is that all three causes of actions are barred. We take issue with Plaintiff that the Connecticut six-year statute of limitations for contracts is the applicable statute of limitations for this Section 301 action. Both the Supreme Court and this Court have reserved judgment on the question of the proper statute of limitations in a Section 301 action.[6] It is Avco's contention that *either* 9 U.S.C. 12, *or* 54-420 of the Connecticut General Statutes, which sets a thirty-day limit on motions

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[6] *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 705 n.7 (1966), which was not an appeal from an arbitrator's award, states:

> "The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement. Such an action closely resembles an action for breach of contract cognizable at common law. Whether other §301 suits different from the present one might call for the application of other rules on timeliness, we are not required to decide, and we indicate no view whatsoever on that question."

Abrams v. *Carrier Corp.*, 434 F.2d 1234, 1252 n.15 (2d Cir. 1970), which also was not an appeal from an arbitrator's award, states:

> "It is again to be emphasized, however, that it does not follow that the limitation period for breach of contract and contract-related claims will apply to all suits brought against a union by a disgruntled member which are normally classified within the fair representation rubric. In each instance the nature of the alleged act of commission or omission on the part of the defendant union must be examined to determine the appropriate federal characterization for statute of limitations purposes."

to vacate an arbitrator's decision, should apply. It is immaterial to us which governs, since Plaintiff was out of time under both.

The Federal District Court of Western Pennsylvania has had frequent occasion to deal with the subject and has consistently held that the federal labor policy goal of expeditious disposition of labor problems (as expressed in *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) requires that the Pennsylvania Arbitration Act statute of limitations apply and conversely that the state *contract* statute of limitations is *not applicable*. *UMV* v. *Jones & Laughlin Steel Corp.*, 378 F. Supp. 1206 (W.D.Pa. 1974); *International Brotherhood of Teamsters* v. *Motor Freight Express*, 356 F. Supp. 724 (W.D.Pa. 1973). The Pennsylvania Federal Court's analysis is equally applicable here.

TABLE

Inaccurate and Incomplete Statements in Plaintiff's Brief

Generally, the listing below will first give the statement as it appears in Plaintiff's brief and then note our analysis.

1. "The article was not distributed in the plant, and it is not known how company officials obtained a copy." (Plaintiff's brief, page 2).

The record is clear and Holodnak himself testified at the trial that he had shown a "draft" copy of the article in question to a number of Avco's employees at the plant. (Ex. 8, Ap. 170a, 422a, 489a, 490a). To propose that circulation of a draft does not equal "distribution" of copies of a publicly circulated newspaper is mere sophistry.

2. In reference to Holodnak's article in the AIM publication, Plaintiff states on page 8 of his brief, "It is 'largely composed of Holodnak's opinions concerning labor management relations at Avco . . .' (97a). It makes no accusations against any individual of 'illegal activity.' (96a). In fact it mentions no names, not even those Holodnak believe 'had not acted in the best interest of the workers.' (96a) . . . Holodnak's article mentions no names of individual employees."

The article was highly critical of Avco (identified by name), as found by Judge Zampano in his ruling on the Motion for Summary Judgment (Ap. 63a), and accused Avco of doing a number of highly improper and probably—if proved—illegal acts, including the following: "the arbitrators and judges for all practical purposes belong to the company," "has engaged in union busting tactics," "buying off effective union opposition with a foremanship," and "the company gets away with its devious and unfair labor practices because the company is above the law." Lastly, there was only one arbitrator at Avco, whom everyone knew, and the reference to an "arbitrator" was fully sufficient to identify him. Plaintiff acknowledges this by remarking that Turkus took it "personally as a direct assault on his fairness . . ." (Plaintiff's brief, page 17).

3. "Both Judge Lumbard and Magistrate Latimer found Holodnak's article less strident than typical union literary efforts in the 'rough and tumble' of labor relations at Avco. (60a, 83a). A few choice quotations from union circulars are included in Judge Lumbard's opinion. (80a)," (Plaintiff's brief, page 9).

It is true that various documents called articles and circulars were proffered at the trial and *alleged* to have been distributed to Avco employees, but they were speci-

fically excluded from evidence by Judge Lumbard (transcript of trial, pages 69, 70, 71 and 72), and, as a result were never qualified or explored by defendant Avco and are improperly commented on here.

4. On page 10 of Plaintiff's brief it is stated that Attorney Burstein read Holodnak's article "ten or fifteen minutes before the hearing was scheduled to begin . . . for the first time."

But that was not Holodnak's testimony. What he said was:

> Q. All right. Will you tell us what transpired between you and Mr. Burstein after he arrived at Howard Johnson Motor Inn?
>
> A. Well, I think the first thing that he did was to acquaint himself with the article that I had written.
>
> Q. He read the article in your presence?
>
> A. Yes, he read it in my presence. (Ap. 176a)

As a matter of fact, there was testimony that Burstein had indeed reviewed the article in advance of the hearing. (Ap. 371a).

5. At page 14 of Plaintiff's brief, it is averred: "Avco is not challenging the amount of the judgment for back wages."

That is incorrect. We say they should be zero and his discharge upheld.

6. Plaintiff says on pages 19 and 20 of his brief that there was nothing in the record to support the statements made in Avco's brief concerning "the lengthy and dismal history of illegal strikes at Avco."

The following exhibits were admitted in evidence at the trial with proper foundation: Exhibit B—Cease and Desist Order and Award and Judge Radin's Order re Confirmation of Award and Arbitrator's Award. Exhibit B sets forth in detail the history of wildcat strikes at Avco and the dire need to bring them to an end. (Ap. 597a-603a).

Arbitrator Turkus stated in his award:

> "Whoever on the Union's side subverts this no strike commitment by *instigating,* leading, *condoning,* or even participating in a wildcat strike, attacks the fundamental basis of collective bargaining. . . ." (emphasis added) (Ap. 601a)

Further, Holodnak testified concerning the history of wildcat strikes, including the discharge of 22 for wildcat strike activity a few months before he wrote his article, and the adverse effect that these strikes had on Avco's employees, operations and products. (Ap. 209a). Holodnak's article certainly "condoned" wildcat strikes under any reading of it.

7. Holodnak contends on page 20 of his brief "there was no evidence of the occurrence of a single wildcat strike after the publication of the article . . ."

This is one which we agree is correct. Possibly it should not be in this list at all, but it makes our point that the action taken through 1968 and 1969, including the discharge of Holodnak, was successful in restoring labor peace.

8. On page 21 of his brief, Plaintiff quotes selected words from *United Steel Workers* v. *Enterprise Wheel and Car Corp.,* 363 US 593, 598 (1960), out of context to show the case as holding that "arbitrators should

write . . . opinions . . ." The Supreme Court also said at 363 US 598:

> "Arbitrators have no obligation to the court to give their reasons for an award."

9. Plaintiff's brief at page 25 says: "General Warren conceded that . . . Avco had no capital investment in the facility (299a)".

The actual record reads exactly the opposite:

> "By Mr. Sosnoff . . .
>
> Q. And Avco has no capital investment in the plant or equipment?
>
> A. No. That is not true. We have considerable capital investment of our own." (Ap. 298a, 299a, testimony of Mr. Warren)

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MICHAEL HOLODNAK, Plaintiff-Appellee vs. AVCO CORPORATION, AVCO LYCOMING DIVISION, STRATFORD, CONNECTICUT, Defendant-Appellant	CIVIL APPEAL NO. 74-2381

CERTIFICATE OF SERVICE

I hereby certify that two copies of Defendant's Reply Brief have been furnished by regular mail to Eugene N. Sosnoff, Esq., 35 Elm Street, New Haven, Connecticut 06510, Attorney for the Plaintiff, on the 24th day of January, 1975.

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